PP

v.

ONG LOCK SOON

HIGH COURT MALAYA, SHAH ALAM
ZAHARAH IBRAHIM J
[CRIMINAL TRIAL NO: 45-45-2002]
7 NOVEMBER 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Whether accused committed offence of trafficking in a dangerous drug - Prima facie case - Whether established*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drug - Whether legal presumption of trafficking under s. 37(da) could be invoked - Prosecution to prove that accused had physical possession of heroin and knowledge thereof - Heroin found in plastic packets attached to accused's body - Presumption under s. 37(da) invoked - Burden on defence to rebut presumption raised under s. 37(da) on balance of probabilities*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Difference between trafficking drugs and bringing drugs in transit - Control mechanism in Part V of Act meant for overseeing importation/exportation of dangerous drugs intended for legitimate purposes*

EVIDENCE: *Expert evidence - Evidence of chemist - Dangerous drugs - Sample taken for analysis - Whether 10% at least of substance must be analysed - Whether chemist had conducted proper tests and whether those tests are sufficient - Dangerous Drugs Act 1952, s. 39B(1)(a)*

The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") with the offence of trafficking in a dangerous drug. According to the prosecution, on 28 February 2002, SP4, a security officer with the Malaysia Airports Berhad, was on duty at the entrance to the holding area of Gate 16 at KLIA International Airport in Sepang. His job was to check on passengers about to board flight MH 123 bound for Sydney, Australia. While performing a routine body check on the accused, SP4 felt something soft on the arm. The accused was then taken to the examination room where transparent plastic packets containing a white substance was found taped around the accused's right arm, left arm and abdomen. Analysis by the chemist showed that the white substance in the three transparent plastic packets contained 157.5, 155.2 and 509.2 grams of heroin, respectively.

The prosecution submitted that it had proved the nature and weight of the drug in question and actual possession by the accused, thus giving rise to the presumption under para. 37(da) of the DDA. It was argued further that the actual act of trafficking had also been proved. Counsel for the accused argued that the prosecution had failed to prove a *prima facie* case for, *inter alia*, the following reasons: (a) the prosecution had failed to prove possession with *mens rea*; (b) the drugs in question were drugs "in transit"; and (c) the chemist's evidence was doubtful as to the nature and quantity of the drugs examined by him. The accused further denied that he knew the packets contained heroin. According to him, as far as he knew, the packets contained Chinese herbs.

Held (finding the accused guilty of the charge):

(1) The court disagreed that 10% at least of the substance must be analysed. What the court has to be satisfied of is whether the chemist had conducted the proper tests and whether those tests were sufficient to enable him to come to the conclusion that there was heroin in the substance and the weight was as stated. The court was satisfied that the substance in the three packets found on the accused contained heroin weighing 821.9 grams. (paras 29, 31, & 34)

(2) The accused had physical possession of the three packets. The presumption in para. 37(da) of the DDA would only be raised if it was proved that the accused also had knowledge of the presence of the heroin in the packets. The white substance in the packets could be seen very clearly. The manner in which the three packets were attached to the accused's body and the manner in which he concealed them pointed irresistibly to his knowledge of the nature of that white powder in the three packets. The court was therefore satisfied that the accused knew of the presence of heroin in the packets secured of his upper arms and abdomen. (paras 35, 38, 40 & 41)

(3) There was nothing in the prosecution's case that could form a basis for any consideration of the argument that the drug in question was "drug in transit". (para 44)

(4) The prosecution had proved, *prima facie*, that the accused had physical possession of the heroin and that he knew that the substance in the packets found on him contained heroin. That being the case, under para. 37(da) of the DDA, the accused "shall be presumed, until the contrary is proved, to be trafficking in" the heroin in question. The burden on the defence was to rebut the

presumption raised under para. 37(da) of the DDA on the balance of probabilities. The accused had not succeeded in rebutting, on the balance of probabilities, the presumption in para. 37(da) of the DDA. (paras 45, 62 & 73)

(5) After the enactment of s. 39B and the definition of "trafficking", the control mechanism in Part V of the DDA is only meant for the purpose of overseeing the importation/exportation of dangerous drugs intended for legitimate purposes, and also for the purpose of overseeing acts affecting the drugs while in transit. Therefore, neither s. 19(4) nor any other provision in Part V of the DDA was applicable here. (paras 84 & 86)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 3 CLJ 551 CA ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(refd)***
Looi Kow Chai v. PP [2003] 1 CLJ 734 CA ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
PP v. Jorge Enrique Pellon Tellon [1998] 4 CLJ 278 CA ***(refd)***
PP v. Ooi Teng Chian [2005] 4 CLJ 557 CA ***(refd)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
Surentheren Selvaraja v. PP [2005] 2 CLJ 264 CA ***(refd)***
Toh Su Kuan v. PP [2005] 3 CLJ 740 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 277
Dangerous Drugs Act 1952, ss. 19(4), 21(6), 37(da), 39B(1)(a)

For the accused - V Sithambaram; M/s V Sithambaram & Assoc
For the prosecution - Faizah Mohd Salleh, DPP (AG's Chambers)

Reported by Amutha Suppayah

JUDGMENT

Zaharah Ibrahim J:

Introduction

[1] The accused, Ong Lock Soon, was charged under para 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") with the offence of trafficking in a dangerous drug.

[2] Deputy public prosecutor Puan Faizah binti Mohd Salleh conducted the prosecution for the public prosecutor. The accused was represented by Dato' Sithambaram.

The Charge

[3] The charge ("Charge") against the accused was as follows:

> Bahawa kamu, pada 28 Februari 2002 jam lebih kurang 8.30 malam, di Gate C16, Bangunan Satelite, Lapangan Terbang Antarabangsa Kuala Lumpur, Sepang, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah memperedarkan dadah berbahaya, iaitu heroin seberat 821.9 gram dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Prosecution's Case

The Facts According To The Prosecution

[4] According to the prosecution, on 28 February 2002, about 8.30 in the evening, SP4, a security officer with the Malaysia Airports Berhad who was also an auxiliary police officer, was on duty at the entrance to the holding area of Gate 16 of the satellite building at KLIA International Airport in Sepang. His job was to check on passengers about to board flight MH 123 bound for Sydney, Australia, to ensure that no dangerous item was carried on board the aeroplane.

[5] The accused went through the walk-through metal detector. After he passed through the detector, SP4 performed a routine body check on him. SP4 began his body check of the accused by holding the accused's right arm. SP4 felt something soft on that arm. He then called SP6 over and they took the accused to the examination room which was located about ten metres from the place where the initial check was conducted. The examination room was somewhere to the side of the holding area of Gate 16.

[6] In the examination room, the accused was asked to take off his shirt. He did so and SP4 saw that something was attached with what appeared to be a blue and white tape, to both of the accused's upper arms.

[7] SP4 then unwound the tape around the accused's right arm and found underneath a transparent plastic packet containing a white substance which SP4 suspected to be a dangerous drug. SP4 then asked SP6 to contact their superiors and the narcotics officers.

[8] Inspector Maidu (SP7) and Inspector Azhar came to the examination room and SP4 handed over the packet of white powder to SP7. SP7 directed SP4 and SP6 to take the accused to the police station at Level 3 of the Main Terminal Building ("MTB") of the KLIA. SP7 and Inspector Azhar went with them. They then went to the examination

room on Level 3 of the MTB. SP7 handed back the packet of white powder to SP4 and he and Insp. Azhar waited outside the room while SP4 and SP6 conducted further body search on the accused.

[9] SP4 found 2 more transparent plastic packets of white powder on the accused. One on his left upper arm, covered with blue and white adhesive tape wound around the arm, and another, bigger, against his abdomen, also held in place by blue and white adhesive tape.

[10] SP4 then took the accused and the items found on the accused to the police station on Level 3 and made a police report. The accused then was handed over to the investigation officer, Chief Inspector Lee Chee Yong (SP11).

[11] The items recovered from the accused's body were subsequently sent to the Chemistry Department for analysis. SP9 was the chemist who performed the analysis. SP9 found that the white substance in the three transparent plastic packets contained 157.5, 155.2 and 509.2 grams of heroin, respectively. The total weight of heroin in the packets was 821.9 grams, as stated in the charge. The three packets, without the contents, were produced in court and marked as exh. P43, P46 and P49, respectively.

Burden On The Prosecution

[12] The burden on the prosecution at the close of its case is as set out in subsection 180(1) of the Criminal Procedure Code, namely, to make out a *prima facie* case against the accused. The Federal Court in the case of *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85 FC, and the Court of Appeal in the case of *Looi Kow Chai v. Public Prosecutor* [2003] 1 CLJ 734 CA have clearly explained what a *prima facie* case is.

[13] The Deputy Public Prosecutor, Puan Faizah binti Mohd. Salleh, in her opening speech, indicated to the court that the prosecution would be leading evidence to prove not only that the accused had possession of the heroin in question, but also that the accused in fact trafficked in the heroin in question.

[14] At the close of the prosecution's case, the prosecution submitted that it had proved the nature and weight of the drug in question and actual possession by the accused, thus giving rise to the presumption under para 37(da) of the DDA. It was argued further that the actual act of trafficking had also been proved.

[15] Dato' V Sithambaram, for the accused, argued that the prosecution had failed to prove *a prima facie* case for the following reasons:

A – the prosecution had failed to prove the identity of the packets P45, P48 and P51, which allegedly contained the heroin which was the subject-matter of the charge

– the prosecution has failed to prove possession with *mens rea*

B – the drugs in question were drugs "in transit"

– the chemist's evidence was doubtful as to the nature and quantity of the drugs examined by him.

C **Identity Of Drug**

(1) Whether The Substance Produce In Court Was The Same Substance In The Packets Recovered From The Accused

[16] The defence argued that SP4, being the person who actually removed the packets of white powder from the accused's arms and D abdomen, must be able to identify the substance in question. It was pointed out, during submissions at the close of the prosecution case, that SP4 was not able to say for certain that the powder in P45, P48 and P51 was the powder in the packets he removed. This was, it was argued, fatal to the prosecution's case.

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[17] P45, P48 and P51 were actually packets supplied by the chemist and in which the chemist placed the remainder of the substance from packets P43, P46 and P49 after analysis. SP4 therefore could not have seen the plastic packets P45, P48 and P51 before he came to give F evidence in court. SP4 would be lying if he were to tell the court he could identify the white substance in the packets as the white substance in the packets he removed from the accused's arms and abdomen. SP4 was being truthful when he said that could not identify the white substance in the packets P45, P48 and P51 as the white substance in G the packets he removed from the accused's arms and abdomen.

[18] SP4 gave evidence that before handing over the packets seized from the accused, he marked them with his signature. After removing the second and third packets from the accused's left arm and abdomen, SP4 had custody of the items until they were handed over to SP11 that H same night. The packet removed from the accused's right arm was in the custody of SP4, then SP6, then SP7, and then it was back in SP4's custody before being marked with SP4's signature and handed over to SP11. The photographs of the packets seized clearly show SP4's signature and his name (Ahmad Syawal) can be made out from the I signature. There was no reason to doubt SP4's identification of the packets P43, P46 and P49.

[19] SP11 gave evidence that he received the packets, and the blue and white adhesive tape used to secure the packets to the accused's arms and abdomen, on the same night that they were seized. He marked the packets with the letters "D", "E" and "F", respectively, and placed his initials and the date on each of the packets. The adhesive tapes used to secure the packets to the accused's arms and abdomen were marked "D1", "E1" and "F1", respectively. SP11 also testified that each of the packets "D", "E" and "F" in fact consisted of two packets, one inside the other, but that fact was only evident upon close scrutiny. The markings were made on the outer packet as it was heat sealed with the other packet which actually contained the substance being inside.

[20] SP11 then kept the items seized in his locked steel cabinet in his office to which only he had the key. On 5 March 2002, about five days after the seizure, SP11 took the packets and adhesive tapes seized to Bukit Aman and handed over the items to C/Insp Mohd Roslan (SP8) to have the packets examined for fingerprints. Two hours later, SP11 received the packets from SP8. They were still in the same condition as when they were handed to SP8, except that on the surface of the packets there were traces of chemicals used for fingerprint detection. SP8 confirmed that he handed back to SP11 the same items that were handed over to him, and they were handed over in the same condition that he received them.

[21] SP11 then packed the packets and the adhesive tapes into separate envelopes, and at 2.30 pm on the same day the envelopes were handed over to he SP9. SP9 examined the packets and tapes. He noted the same markings on the packets and tape as SP4 and SP11 said had been made by them and that had also been observed by SP8. It was he (SP9) who removed the white substance from the packets and later, after analysis, placed the substance (that is, what remained after analysis) into separate plastic packets marked "D", "E" and "F" (the same packets and substance later marked as P45, P48 and P51), and with the laboratory reference number (PJ) FOR 1842/02-0.

Finding

[22] I was satisfied from the evidence of SP4, SP8, SP9 and SP11 that the substance produced in court in packets P45, P48 and P51 was the substance found in the packets strapped to the accused's upper arms and abdomen when he was detained by SP4 on the night in question.

(2) Whether The Substance In The Packets Was Heroin With The Weight As Stated In The Charge

[23] SP9 testified that he weighed the substance in the packets and found that the nett weight of the substance in packet "D" was 200.7 grams, the nett weight of the substance in packet "E" was 198.1 grams and the nett weight of the substance in packet "F" was 656.1 grams.

[24] SP9 then removed the substance in packet "D" and blended it in an electric blender for five minutes, to make the substance into a homogeneous substance. He then performed qualitative as well as quantitative tests on the blended substance.

[25] For the qualitative test, two separate tests were performed, the first being the Frohde and Marquis tests (the colour test), and the second being the Gas Chromatography Mass Spectrometer (GCMS) test. SP9 admitted that he did not weigh the samples he took for the qualitative tests. It was argued that without the weight of the samples being taken the sample was not sufficient to produce definitive result. It was also argued that he should have taken 10% of the substance following the decision in *Loo Kia Meng v. PP* [2000] 3 CLJ 653 CA and *Leong Bon Huat v. PP* [1993] 3 CLJ 603 SC.

[26] SP9 explained, when he was re-examined, that it was not necessary for him to weigh the sample taken for qualitative tests since the weight of the sample was not relevant for the determination of the **type** of the drug in the substance. The colour and GCMS tests carried out in fact confirmed that the substance contained heroin.

[27] For the quantitative test, to determine the amount of heroin in the substance in packet "D", SP9 took eight representative samples and tested them using Gas Chromatography (GC). For the quantitative test SP9 recorded the weight of each sampel as he needed to calculate the weight of the heroin in the substance using the percentage of heroin in each sample. He then calculated that for packet "D", the amount of heroin in the substance in that packet 157.5 grams.

[28] The same tests were carried out on the substance in packets "E" and "F" and SP9 found that the substance in packet "E" contained 155.2 grams of heroin, while that in packet "F" contained 509.2 grams of heroin. He had also explained that there was a difference in the percentages of heroin found in the three packets. The percentage of heroin in the substance in envelope L1 (packet "D") was 78.4%, the percentage in the substance in envelope L2 (packet "E") was 78.3% while the percentage of heroin in the substance in envelope L3 (packet "F") was 77.6%.

Finding

[29] I was unable to agree with the argument by the defence that 10% at least of the substance must be analysed. In *Gunalan a/l Ramachandran & Ors v. PP* [2004] 3 CLJ 551 CA, His Lordship Abdul Hamid JCA (as he then was) said:

> I am unable to find any provision in the Act that requires the actual weight of the samples taken must be given in evidence. All that the section says is that, if "such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles ..." (emphasis added). The 10% refers to the number of receptacles, not the total net weight in all receptacles or in each receptacle. This had been made clear by the Federal Court since 1963 in *Au Ah Lin v. Public Prosecutor (supra)*. It is unfortunate that neither *Au Ah Lin v. Public Prosecutor* (FC) *(supra)*, nor *Public Prosecutor v. Lam Sam* (SC) *(supra)* was brought to the attention of the court. Even s. 37(j) which was mentioned in the judgment was not reproduced for closer scrutiny.
>
> In the circumstances, with greatest respect, I am unable to follow *Leong Bon Huat v. Public Prosecutor (supra)* and *Loo Kia Meng v. Pendakwa Raya (supra)*. Instead I prefer to follow *Au Ah Lin v. Public Prosecutor (supra)* and *Public Prosecutor v. Lam Sam (supra)*.

[30] The Court of Appeal in *PP v. Ooi Teng Chian* [2005] 4 CLJ 557 CA agreed with the views of His Lordship Abdul Hamid, JCA, in *Gunalan's* case.

[31] What I had to be satisfied of was whether SP9 had conducted the proper tests and whether those tests were sufficient to enable him to come to the conclusion that there was heroin in the substance and the weight was as he stated in his evidence.

[32] As mentioned above, SP9 had explained the tests he conducted on the substance which he had blended for five minutes in an electric blender so as to make it homogeneous. He also explained his findings. There was nothing in his evidence to raise any doubt that the proper tests and findings had been made.

[33] In *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, at p 494, the Supreme Court said:

> We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion.

A So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

[34] I was therefore satisfied that the substance in the three packets found on the accused contained heroin and the weight of that heroin was B 821.9 grams.

Possession With *mens rea*

[35] That the accused had physical possession of the three packets was not in doubt. The presumption in para 37(da) of the DDA would C only be raised if it was proved that the accused also had knowledge of the presence of the heroin in the packets.

[36] It was argued for the accused that there was nothing in evidence to prove that the accused had the requisite knowledge. The case of *Toh* D *Su Kuan v. PP* [2005] 3 CLJ 740 CA was referred to this court.

[37] The Court of Appeal in *Surentheran Selvaraja v. PP* [2005] 2 CLJ 264 CA was similarly urged to follow *Toh Su Kuan's* case. However, the Court of Appeal in *Surentheran's* case said:

E There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. We have F to look at the particular circumstances of this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances. For that reason we consider that the decision in *Toh Su Kuan* is not relevant for our deliberations.

G **[38]** SP4 and SP6 gave evidence that the packets were secured in place on the accused's upper arms and abdomen by blue and white tape. The tape was found by SP4, SP9 and SP11 to be adhesive tape. SP7 saw the packets and tape on the accused's upper left arm and abdomen. The packets were not covered by anything else. In other words, upon the H tape holding them in place on the arms and abdomen being removed, the white substance in the packets could be seen very clearly. The accused must therefore have seen the white substance in the packets as they were being placed on his upper arms and abdomen, before being secured and covered with the blue and white tape.

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[39] As the blue and white tape was adhesive tape and given the size of the packets, some part of the tape, especially in relation to the packet secured against his abdomen, must have come in contact with the accused's skin. The accused was about to board a plane going on a long journey to Sydney. With the packets thus secured around his upper arms and abdominal area, the accused could not have been comfortable.

Finding

[40] The accused must have known what was in the packets and hence had allowed the packets to be hidden from view in that manner. The manner in which the three packets were attached to the accused's body and the manner in which he concealed them pointed irresistibly to his knowledge of the nature of that white powder in the three packets.

[41] I was therefore satisfied that the accused knew of the presence of heroin in the packets secured of his upper arms and abdomen on the night in question.

Drugs In Transit

[42] It was argued that the drugs found on the accused that night was "drug in transit". Reliance was placed on the decision of the Court of Appeal in *Public Prosecutor v. Jorge Enrique Pellon Tellon* [1998] 4 CLJ 278 CA. In that case, the trial judge, at the close of the prosecution case, amended the charges, from an offence under s. 39B of the DDA to one under subsection 21(6) of the DDA.

[43] At the close of the prosecution case, in the case before me, there was nothing in evidence to suggest that the drug found on the accused was drug which was brought in by someone, never left the airport premises, and was transferred to the accused at the airport premises to be taken out of Malaysia. In this respect the facts differed from the case of *Jorge Enrique Pellon Tellon*. In that case, even during the prosecution case there was no dispute that the accused was on a flight from Buenos Aires to Indonesia *via* Kuala Lumpur. He was only on transit in Kuala Lumpur, and was due to leave Malaysia almost immediately upon arrival. He never left the airport.

Finding

[44] I was therefore satisfied that there was nothing in the prosecution's case that could form a basis for any consideration of the argument that the drug in question was "drug in transit" in the same manner as in the case of *Jorge Enrique Pellon Tellon*.

A **Finding At The Close Of The Prosecution's Case**

[45] At the close of the prosecution's case. I was satisfied that the prosecution had proved, *prima facie,* that the accused had physical possession of 821.9 grams of heroin at the time and place stated in the charge and that he knew that the substance in the packets found on him contained heroin. I therefore found that he had actual possession of the heroin in question. That being the case, under para 37(da) of the DDA, the accused "shall be presumed, until the contrary is proved, to be trafficking in" the heroin in question.

[46] The accused was therefore called upon to enter his defence. The accused elected to give evidence on oath.

Defence

The Facts According To The Defence

[47] According to the accused, he worked as a debt collector and as a bodyguard. He worked as a bodyguard to "Datuk" and rich men, sometimes in Malaysia and sometimes overseas.

[48] Sometime in the middle of the year 2000, he came to know a person by the name of Ah Hee. Ah Hee was introduced to him by a friend of the accused, Ah Tat. Ah Hee was a football bookie. Ah Hee knew of the accused's job as debt collector and bodyguard. After knowing Ah Hee, the accused had also placed bets with Ah Hee.

[49] After two months of knowing Ah Hee, Ah Hee contacted the accused and asked the accused to help him collect some of the debts owed to him (Ah Hee). The accused managed to collect some of the debts.

[50] Ah Hee then introduced the accused to Ah Hee's good friend, Huan Choo. In January 2002, Ah Hee contacted the accused and asked the accused to go with Huan Choo to Australia as Huan Choo's bodyguard and to help Huan Choo collect betting debts owed to Huan Choo. Ah Hee wanted the accused to go to Australia during the Chinese New Year in 2002, but as the accused wanted to celebrate Chinese New Year, the trip was postponed to 28 February 2002.

[51] According to their plan, they were to stay in the Pacific Hotel in Sydney. A friend of Ah Hee was supposed to contact them at the Hotel upon their arrival.

[52] The accused was in Penang on the morning of 28 February 2002. He left Penang and went to a supermarket in Bukit Mertajam, There he met Ah Hee who came with a friend and the three of them went by car to Kuala Lumpur. The accused did not know Ah Hee's friend but the latter's name was also Ah Hee.

[53] They arrived in Kuala Lumpur at 3pm and went to a small hotel at Jalan Alor.

[54] The accused was told by Ah Hee that Huan Choo would meet the accused at the check-in counter of the KLIA. The accused later left the hotel at Jalan Alor by taxi for KLIA. He was alone. He arrived at KLIA at 7.15pm. He did not meet Huan Choo at the check-in counter. He then telephoned Ah Hee who told him to check in first and that Huan Choo would meet the accused at the transit lounge.

[55] The accused checked in, got his boarding pass, went through the security guard at the entrance to the departure area, went through the immigration autogate, and, he said, some customs checkpoint.

[56] While he was on the aerotrain to the satellite building, the accused received a call from Huan Choo who told him that he could not go with the accused to Sydney as his mother was seriously ill and he had to be with her in Bukit Mertajam. He would meet the accused in Sydney two days later. Huan Choo also asked the accused to do something for him. According to Huan Choo, his friend, Ah Tong was due to arrive in KLIA from Hong Kong, en route to London. The friend was supposed to hand over to Huan Choo some Chinese herbs. As Huan Choo was not able to be there, he asked the accused to take the Chinese herbs from the friend and take it to Australia with him. As the Australian immigration was quite strict, Huan Choo asked the accused to hide the herbs. The herbs were meant for a relative of Huan Choo's who was suffering from brain cancer.

[57] The accused agreed. He was told that Ah Tong would contact him. Huan Choo asked the accused to describe to him the clothes the accused wore. Huan Choo said he would give Ah Tong the accused's phone number and a description of the clothes the accused wore.

[58] The accused was walking towards Gate 16 from the aerotrain when he received a call from Ah Tong. Ah Tong asked the accused to wait at a toilet near Gate 16. The accused met Ah Tong there. Ah Tong was bespectacled and smartly dressed. Ah Tong told the accused that the herbs must not be handed over to the accused openly. They then went into a toilet cubicle and there Ah Tong took out the Chinese herbs

and secured the packets of Chinese herbs to the accused's body. According to the accused, the process of securing the packets to his body took about 5 to 6 minutes.

[59] The accused then went to line up at Gate 16. He saw one or two persons in front of him being touched by the security personnel but he went ahead as Ah Tong had said that all that would happen if the thing was found was that it would be seized but the accused could proceed on his journey.

[60] What happened next was as described in the prosecution's case.

[61] The accused denied that he knew the packets contained heroin. According to him, as far as he knew, the packets contained Chinese herbs.

Burden On the Defence

[62] Based on *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89, *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC, and other similar decisions, the burden on the defence is to rebut the presumption raised under para 37(da) of the DDA on the balance of probabilities.

[63] The long and short of the accused's version of the events leading to his arrest was that he did not know that the packets secured to his arms and abdomen contained heroin. As far as he knew, it contained Chinese herbs. Did the accused really not know that the substance in the packet contained heroin?

From The MTB Until The Accused Lined Up At Gate 16

[64] According to the immigration officer Encik Amirul Ariffin (SP5), and the document P52, the accused passed through the immigration autogate on the night in question at 8.16pm. The accused said that he was lining up in front of Gate 16 at 8.40pm. According to SP4 and SP6, the accused was first checked by SP4 about 8.30pm.

[65] According to the accused's version, therefore, 24 minutes after passing the immigration autogate he had walked to the aerotrain station at the MTB, rode on the train to the satellite building, walked to the toilet near Gate 16, be identified by Ah Tong, entered a cubicle in the toilet, saw Ah Tong take out the three packets of substance (and surely also the blue and white adhesive tape), allowed Ah Tong to secure the packets around his upper arms and abdomen with the tape, put his shirt back on, walked out of the toilet and lined up at Gate 16.

[66] Could all the activities mentioned above take place within the space of 24 minutes?

[67] SP5 informed the court that it would take between 15 to 20 minutes to get to the satellite building from the MTB using the aerotrain. This evidence was not challenged by the defence.

[68] SP4 claimed that he took about 40 minutes to remove the packets from the left arm and around the abdomen of the accused. This was not challenged during cross-examination. If it took 40 minutes to remove two packets, how long would it take to place three packets such that the packets were completely covered by the tape and were secure? Surely it would take longer than the 40 minutes SP4 took to remove two packets.

Finding

[69] Having considered SP5's unchallenged evidence about the time one needs to get to the satellite building from the MTB and SP4's also unchallenged evidence about the time he took to remove two of the packets, it would not be possible for the accused to pass the immigration autogate at 8.16pm, get to the satellite building, meet up with Ah Tong, get into the cubicle at the toilet, take off his shirt, have the packets secured to his body, put his shirt back on, and walk to Gate 16 to line up there by 8.40pm.

Did Huan Choo exist? Where was Ah Hee? Why the hotel at Jalan Alor?

[70] According to the accused, every arrangement until the phone call he received on the aerotrain, had been made by Ah Hee. Ah Hee was the one who asked him to go to Sydney to help Huan Choo. Ah Hee met the accused at Bukit Mertajam. Ah Hee took him to Kuala Lumpur. Ah Hee told him that he would stay at the Pacific Hotel in Sydney. It was Ah Hee's friend who was supposed to meet them at the hotel in Sydney. It was Ah Hee who told him to check in first. Was there in fact a Huan Choo who was supposed to go to Sydney with the accused?

[71] The accused was taken to a hotel in Jalan Alor when he arrived in Kuala Lumpur at 3pm. He later took a taxi to the KLIA. What happened to Ah Hee and his friend, also Ah Hee, who brought the accused all the way from Bukit Mertajam to Kuala Lumpur? Why didn't **they** take him to KLIA?

[72] The accused arrived in KLIA about 7.15pm. The trip by taxi from Jalan Alor to KLIA could not have taken less than one hour. He must have checked out by 6.15pm. Why check into a hotel for only three hours? Why could he not be taken straight to the KLIA? Was it because the three packets were in fact delivered and bound to his body at the hotel in Jalan Alor?

Finding At The Close Of Defence Case

[73] Upon considering the evidence given by the accused, I was not satisfied that he had succeeded in rebutting, on the balance of probabilities, the presumption in para 37(da) of the DDA.

Part V Of The DDA - Drug in Transit

The Case Of *Jorge Enrique Pellon Tellon*

[74] Before making my decision, I gave serious consideration to the argument put forth on behalf of the accused at the close of the whole case that even if he had knowledge of the nature of the drug in the packets found on his body, at most he was only guilty of an offence under subsection 21(6) of the DDA. The court, it was submitted, was bound to follow the decision in the case of *Jorge Enrique Pellon Tellon.*

[75] Subsection 21(6) of the DDA reads as follows:

> (6) Any person who brings any dangerous drugs into Malaysia in transit otherwise than in accordance with the provisions of this section shall be guilty of an offence against this Act, and shall be liable on conviction to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[76] In the case of *Jorge Enrique Pellon Tellon,* the accused was the one who brought into the country the drug in question. Both the drug and the accused were clearly in transit, their final destination being Indonesia. In the case before me, if the accused's story were to be believed, the drug was in transit, having been brought into the country by Ah Tong, with its final destination being Sydney, Australia. However, it was the accused who was in the process of exporting it from Malaysia to its final destination. Subsection 21(6) of the DDA, which formed the basis for the decision in the case of *Jorge Enrique Pellon Tellon,* is clearly not the relevant provision in the case before me. I was therefore of the view that the decision in the case of *Jorge Enrique Pellon Tellon* was not binding on me in this case.

Subsection 19(4) of the DDA

[77] For exports of drugs from Malaysia under Part V of the DDA, the relevant provision is subsection 19(4) which reads as follows:

> (4) Any person who shall export any dangerous drug from Malaysia except in pursuance of and in accordance with the provisions of this Act and the terms and conditions of any authorization or licence granted under this Act in respect of such export shall be guilty of an offence against this Act, and shall be liable on conviction to imprisonment for a term not exceeding five years and not less than three years.

[78] Subsection 19(4) and subsection 21(6) are contained in Part V of the DDA, which relates to the control of external trade. Part V was enacted to give effect to this country's obligations under art. 31 of the Single Convention on Narcotic Drugs, to which Malaysia is a party. Under art. 39 of the Single Convention, each State Party is empowered to enact more stringent measures to control narcotic drugs.

[79] In 1975, this country's Parliament enacted the Dangerous Drugs (Amendment) Act 1975. Through this Act, s. 39B which provides for the offence of trafficking in dangerous drugs, as well as the definition of 'trafficking", were inserted into the DDA. Among the reasons for such amendments was the increase in the export of dangerous drugs from Malaysia to other countries, particularly Europe. In his speech when introducing the Bill in the Dewan Rakyat on 8 April 1975, the Honourable Minister said (as reported at p 4494 of the relevant Hansard):

> ... Pada mulanya apabila masaalah penyalahguna dadah ini menjadi suatu perkara yang membimbangkan dalam Negeri ini, terutama di kalangan ibu-bapa, corak perdagangan dadah secara haram semata-mata tertumpu kepada negeri ini sahaja. Akan tetapi, Tuan Yang di-Pertua sekarang ini tidak lagi begitu. Dalam bulan-bulan yang baru ini beberapa orang Malaysia yang ditangkap di Eropah, kerana terlibat dalam heroin ini dan menunjukkan yang corak perdagangan secara haram telah berubah. Sekarang ini masaalah itu telah menjadi masaalah antarabangsa.
>
> Rampasan heroin baru-baru ini di Eropah dari orang-orang Malaysia menunjukkan yang heroin bukan sahaja digunakan dalam negeri ini bahkan untuk diekspot. Syndicate-syndicate dadah dalam Malaysia telah mendapat pasaran baru heroin di Eropah. ... Cara gerakan baru yang diambil oleh syndicate dalam negeri ini ialah dengan menggunakan pembawa (carrier) untuk melakukan kerja itu bagi pihak mereka. Pembawa-pembawa ini dibayar dengan lumayan bagi tiap-tiap kiriman yang dapat lepas ke Eropah. Segala kemudahan lain seperti tambang udara untuk naik kapalterbang pergi dan balik, penginapan di hotel, paspot antarabangsa adalah disediakan oleh syndicate dadah ini.

The Honourable Minister further said (at p 4496 of the Hansard):

> ... Rang Undang-Undang ini juga bertujuan mengadakan peruntukan bagi kesalahan memperdagangkan dadah merbahaya dan penalti baginya adalah hukum bunuh atau penjara seumur hidup disertakan dengan sebat dengan rotan. Hukuman seperti ini nampaknya patut memandangkan kepada bertambahnya bilangan kes perdagangan dadah.

[80] How then do we reconcile the provisions in Part V of the DDA with the definition of trafficking and s. 39B of the DDA as we must? The answer to that lies, in my view in the Single Convention itself.

[81] The Single Convention, according to the Training Manual issued by the United Nations International Narcotics Control Board, "aims to restrict the use of narcotic drugs to medical and scientific purposes and to prevent their diversion and abuse, while at the same time ensuring their availability for legitimate purposes.".

[82] In relation to the importation and exportation of narcotic drugs, art. 31 pursuant to which Part V of the DDA was enacted, provides for the regime necessary to ensure that drugs imported or exported meet the requirements of the importing country for the legitimate purposes allowed under the convention. If Part V of the DDA is closely scrutinized, it is clear that it contains the mechanism which this country is obliged to put in place to control and supervise the importation and exportation of narcotic drugs for medical and scientific purposes as allowed under the convention, and dealings with such drugs while in transit.

[83] The mechanism in Part V was adequate to control the entry and exit of dangerous drugs which were meant for legitimate purposes but did not have the necessary authorization or approval, as well as dangerous drugs for illicit purposes. Obviously they were no longer adequate by 1975. By inserting s. 39B and the definition of "trafficking" into the DDA in 1975, parliament made it clear that it wanted a separate and more, stringent means of controlling the movement of drugs meant for illicit purposes, as a state party is allowed to do under art. 39 of the single convention.

[84] In other words, in my view, after the enactment of s. 39B and the definition of "trafficking", the control mechanism in Part V of the DDA is only meant for the purpose of overseeing the importation/exportation of dangerous drugs intended for legitimate purposes, and also for the purpose of overseeing acts affecting the drugs while in transit.

[85] In 1983, Parliament went one step further. It inserted the provision as in para 37(da) into the DDA, to presume that a person found in possession of specified amounts of certain dangerous drugs is trafficking in that drug. It also removed the alternative sentence of life imprisonment from s. 39B, thus leaving only the penalty of death for a person convicted of an offence under that section. This step underscored Parliament's earlier intention (as demonstrated in the 1975 Amendment) of providing a more stringent regime of control for dangerous drugs meant for illicit purpose.

[86] For the reasons set out above, I was and am of the opinion that neither subsection 19(4) of the DDA nor any other provision in Part V of the DDA was applicable in the accused's case.

Conviction And Sentence

[87] At the conclusion of the whole trial, having considered all the evidence adduced before this court, I was satisfied that the prosecution had proved its case against the accused beyond reasonable doubt. I therefore found the accused guilty of the charge and convicted him on it.

[88] The accused was sentenced to death under subsection 39B(2) of the DDA. As required under s. 277 of the Criminal Procedure Code, I directed that the accused be hanged by the neck until he is dead.